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ABSTRACT

Through an analysis of the six federal book banning cases that have been adjudicated in the past decade since "Ginsberg v. New York" and "Tinker v. Des Moines Independent School District," this paper explores the difference in current First Amendment theory in the area of student access to books. A review of the six cases indicates that the federal courts are not in agreement in the area of delineating the First Amendment rights of minors, and different federal circuit courts of appeals are moving in different judicial directions, each relying on its own interpretation of the standards proposed by the Supreme Court in "Ginsberg" and "Tinker." The Review concludes that different courts have used the language of these two cases to arrive at widely varying positions on what First Amendment rights public high school students enjoy in the area of access to books. (MKM)

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AFTER GINSBERG AND TINKER:

BOOK BANNING AND MINOR'S FIRST AMENDMENT RIGHTS

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Introduction

Over a decade has passed since the U.S. Supreme Court dealt with the issue of the First Amendment rights of children in the cases Ginsberg v. New York[1] and Tinker v. Des Moines Independent School District.[2] During that period federal courts have had to fashion their own theories of First Amendment rights of children without further Court guidance.

The legacy of the Supreme Court decisions and the current lack of a unified approach in various federal courts have given rise to a situation in which the discretion of school boards is so broad and the judicial review procedure so unsystematic that a Pulitzer prizewinning novel like The Fixer by Bernard Malamud can be removed as casually as Jacqueline Susann's Once is Not Enough.[3] This paper analyzes the Ginsberg-Tinker legacy and the federal book banning cases that have been adjudicated in the past decade and explores the differences in current First Amendment theory in the area of student access to books.

The Ginsberg-Tinker Legacy

Ginsberg v. New York tested the constitutionality of a state law which prohibited the sale to minors under 17 years of age material defined to be obscene on the basis of its appeal to children. At the outset of the case, New York determined that the "girlie" magazines sold to a minor in this case would not be considered obscene for adults. Thus, the issue that the U.S. Supreme Court faced was not whether such material could be sold to adults, but rather if a state could apply different standards for determining what is obscene

for children.

In determining that the state does have the power to adopt what has been termed "variable obscenity" standards,[4] the Court pointed out the general authority of legislatures:

> That the State has power to make that adjustment (i.e., differing standards for obscenity) seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond its authority over adults."[5]

This authority derives from two interests. The first is the right of parents to control their children:

> (C)onstitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society . . .The legislature could properly conclude that parents and others, teachers, for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility . . .Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[6]

The second interest promoted by this law is the concern of the state itself for the well-being of its youth:

> (T)he Knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards. . .[7]

Finally, the Court pointed out that since "obscenity is not within the area of protected speech and press,"[8] this statute does not invade constitutional rights. For this reason, the Court rejected the assertion by New York that the sale of such material to minors poses "a clear and present danger to the people of the state,"[9] and noted that such a test is not required where unprotected speech is an issue.

Application of the "clear and present danger doctrine"[10] would compel the

state to demonstrate a showing of circumstances which could lead to turbulence. The Court was sceptical about this link and registered doubt that "this finding by New York expressed an accepted scientific fact."[11] Nevertheless, the law is upheld because the test is not required and because the law promotes the legitimate interest of the State in its youth.

In his concurring opinion, Mr. Justice Stewart sums up the underlying philosophy of the majority:

> I think a State may permissably determine that, at least in some percisely delineated areas, a child . . .is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights--the right to marry, for example, or the right to vote--deprivations that would be constitutionally intolerable for adults.[12]

In contemplating the implications of Ginsberg, two factors must be kept in mind. The first is that in using obscenity doctrine to hold the statute valid, and not some other ground, such as the Fourth Amendment, the Court was in a sense, since obscenity is not protected speech, making this a non-First Amendment issue; and, therefore, the ability of the states to regulate the reading matter of minors is a limited one. "Ginsberg should not be read to support broad state restrictions on the access of minors to nonobscene material such as violent films even if the state reasonably judges them to be injurious to minors."[13]

The second factor is that the New York statute was very narrowly drawn. It only restricted visual material of a specific nature and said nothing whatever about the publication of ideas.[14]

The next case under review dealt with communication which was very clearly within the ambit of the First Amendment.

Tinker v. Des Moines Independent School District[15] grew out of a ruling by public school officials that prohibited students from wearing black armbands as symbols of their sentiments against the Vietnam war. In its adjudication of

the case, three facts were emphasized by the Supreme Court: first, only seven out of 18,000 Des Moines school children chose to wear the arm bands; second, the administrators' contention that a disturbance that would interfere with school discipline would result from the display was not realized; and third, students in the schools prior to this incident had been allowed to wear political symbols such as the Nazi Iron Cross and national political campaign buttons.

In its opinion, which held unconstitutional the ruling of the school administrators, the Court took the opportunity to emphasize the First Amendment rights of children:

> First Amendment rights, applied in light of the special character of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakeable holding of this Court for almost 50 years.[16]

The Court displayed its respect for the authority the states and school officials have to control conduct in the schools, but pointed out that this case deals not with conduct "that intrudes upon the work of the school or the rights of other students,"[17] but rather with "direct, primary First Amendment rights akin to 'pure speech.'"[18] A simple fear on the part of school officials that a disturbance may erupt is not sufficient ground to deny First Amendment rights:

> (I)n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear . . .But our constitution says we must take this risk . . .[19]

The Court went on to reinforce the full constitutional rights of children:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . .In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to free expression of their views.[20]

This reference to an "absence of a specific showing of constitutionally valid reasons to regulate their speech" suggests that in Tinker the Court was applying the clear and present danger doctrine. There was no showing by officials that the speech in question might lead to violence or serious disruption of school discipline. In fact, the official's position was based on the feeling that "schools are no place for demonstrations."[21] Since there was no danger of serious disruption, under the clear and present danger test the speech could not be proscribed.

It should be noted that in this case the Court made no attempt to differentiate between the First Amendment rights of adults and minors as Justice Stewart did in his concurring opinion in Ginsberg. Since the Court chose not to qualify its opinion, it "appears to have concluded either that minors do in fact possess the necessary capacity for claiming and exercising First Amendment rights or that the level of capacity is not crucial to making the threshold determination whether such rights are applicable to minors."[22]

The apparent differences in the holdings of Ginsberg and Tinker, which were decided within a year of each other, can be explained in terms of the nature of the expression involved; one dealt with obscenity (a form of communication not protected by the First Amendment) and the other with political speech (the very type of communication some commentators believe the First Amendment was expressly written to protect).[23]

However, at least one member of the Court was confused enough by the difference between the two holdings to remark: "I cannot share the Court's uncritical assumption that . . .the First Amendment rights of children are coextensive with those of adults. Indeed, I had thought the Court decided otherwise just last term in Ginsberg . . ."[24] This judicial confusion over what Ginsberg and Tinker did mean about the First Amendment rights of minors is the real legacy

of these cases. As will be demonstrated, different courts have used the language of Ginsberg and Tinker to arrive at widely varying positions on what First Amendment rights public high school students enjoy in the area of access to books.

Access to Books Cases

Litigation involving access to books during the decade under review was limited to six federal cases--two at the circuit court level and four at the district court level. The first federal appeals court case after Ginsberg and Tinker to deal with the removal of books from public school libraries occurred in the 1972 case Presidents Council v. Community School Board No. 25.[25] Here the U.S. Court of Appeals for the Second Circuit held that the community school board of Queens, New York, did not violate the First Amendment when it made the book Down These Mean Streets, an autobiographical novel by Piri Thomas depicting a youth's life in Spanish Harlem, available only on a restricted basis.

The case grew out of a resolution passed unanimously by the Board "permitting the book to be kept at those schools which previously had the book in their libraries but making it available on a direct loan basis to the parents of the children attending these schools."[26]

This resolution was developed in response to complaints by some parents that the book would have an "adverse moral and psychological effect on 11 to 15 year-old children, principally because of the obscenities and explicit sexual interludes."[27]

In contrast, the plaintiff-appellants in this case, a group of presidents and past presidents of various parent and parent-teacher associations, along with selected parents, teachers, students and librarians, supplied affidavits from psychologists, teachers and children who claimed that the book is valuable and had no adverse effect on the development of the children of the District.

Presented with such divergent information, the Court of Appeals chose not to review "the wisdom of the efficacy of the determinations of the Board."[28] Rather it construed the issue of the case narrowly: did the Board transgress its authority when it implemented the resolution? Citing a 1968 U.S. Supreme Court decision[29] which suggests that public education ought to be committed to the control of state and local authorities, the Court of Appeals determined that the action of the Board did not constitute an "impingement upon any basic constitutional values."[30] The Court reached this determination based on its contention that in every library, some person or body must decide books to be purchased and that this decision may always be considered ill-advised by some group. However, the Court reasoned: "(T)he ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did there would be a constant intrusion of the judiciary into the internal affairs of the school."[31]

Having determined that the case did not present a First Amendment issue, the Court quickly dismissed the three grounds the appellants attempted to establish. The first was a reliance upon Ginsberg v. New York: "Appellants reading of the case as authority for the proposition that minors have an unqualified first amendment right of access to books unless they are obscene . . . is totally unjustified."[32]

The second ground dealt with the notion of tenure: appellants contended that although the Board had the initial authority to select and approve books for the library's collection, once a book had been acquired, a special protection adhered to it, analogous to the protection afforded a public employee who tried to retain employment in the fact of proposed termination. The Court did not agree:

> This concept of a book acquiring tenure by shelving it is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place."[38]

The third ground dismissed by the Court was a reliance upon Tinker:

> The appellant conveniently ignores the factual setting of Tinker but would have us apply its test. Since the shelving of Down These Mean Streets did not create any disruption or disorder, it is argued, it should remain on the shelf. There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students, or librarians. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book.[34]

In summary, Presidents Council v. Community School Board No. 25 establishes the notion that the unshelving of books, absent the showing that discussion of the ideas contained in the books has also been curtailed, is not a constitutionally protected activity.

After the 1972 ruling in Presidents Council, two U.S. District Courts within the jurisdiction of the Second Circuit Court of Appeals were compelled to look to that case as precedent in adjudicating similar issues. In the first, Pico v. Island Trees School District,[35] a U.S. District Court in New York held that the First Amendment was not violated by the school board's removal from the high school library certain books, including two Pulitzer prizewinners, found to be "irrelevant, vulgar, immoral, and in bad taste"[36] since, according to Presidents Council, the school board has the discretion to determine which books should be in the school library.

The issue in the case, as articulated by the Court, was as narrow as that in Presidents Council: "whether the first amendment requires a federal court to forbid a school board from removing library books which its members find to be inconsistent with the basic values of the community that elected them."[37]

The Court rejected the contention of appellant Pico that three more recent

federal cases,[38] all of which used First Amendment grounds to prohibit banning books from school libraries, were controlling:

> Each of these cases struck down school board restrictions on or removal of library books as unconstitutional, and distinguished Presidents Council . . .the only federal case to uphold similar school board restrictions on library books and the only case on point in this circuit . . .(T)his court concludes that Presidents Council, and not the three more recent federal cases, governs the case at bar, and mandates summary judgement in favor of defendants . . .[39]

In conclusion, the Court pointed out that the challenged action "did not sharply and directly implicate basic first amendment values" and that it thus fell "within the broad range of discretion constitutionally afforded to educational officials who are elected by the community."[40]

In the second case which used Presidents Council as precedent, Bicknell v. Board of Directors,[41] a similar conclusion was reached, this time by a U.S. District Court in Vermont. Administrators of a public school district removed two books[42] from a high school library after a determination that they were "vulgar, obscene or otherwise inappropriate for student readers."[43] Once again, the district court did not review the merits of the administration policy but rather adopted the Presidents Council analysis that no First Amendment rights were implicated in the policy:

> Although the court does not entirely agree with the policies and actions of the defendants, we do not find that those policies and actions directly or sharply infringe upon the basic constitutional rights of the students of Vergennes Union High School.
>
> In making this determination we are required as a lower court to accept the law found in a Second Circuit case strikingly similar to the one at bar.[44]

As was the case in Pico, the court rejected the appellant's argument that other cases which brought library policies within the ambit of the First Amendment were controlling in the instant case: "Whatever merit there may be in such constitutional analysis, it is not the rule we are bound to follow in this circuit."[45]

Finally, the court rejected the argument that recent U.S. Supreme Court decisions in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council[46] and Kleindienst v. Mandel,[47] both of which established a First Amendment right to receive information, altered the underlying premises in Presidents Council. According to the reasoning of the district court, library policy does not have an impact on a student's right to receive information:

> Students remain free to purchase the books in question from private book stores, to read them in other libraries, to carry them to school and to discuss them freely during the school day. Neither the Board's failure to purchase a work nor its decision to remove or restrict access to a work in the school library violate the first amendment rights of the student plaintiffs before this court.[48]

A Different Viewpoint

The three cases that the appellants in Pico and Bicknell had relied upon, unsuccessfully, as the basis for their claim that First Amendment protection extends to public school library policy were the 1976 U.S. Sixth Circuit Court of Appeals decision in Minarcini v. Strongsville City School District,[49] the 1978 U.S. District Court decision in Right to Read Committee v. Chelsea School Committee,[50] and the 1979 U.S. District Court decision in Salvail v. Nashua Board of Education.[51]

Minarcini originated as a class action suit which claimed that the First and Fourteenth Amendment rights of high school students had been violated by an Ohio school board action that disregarded the recommendations of the faculty and refused to approve Joseph Heller's Catch 22 and Kurt Vonnegut's Cat's Cradle and Heller's Catch 22 to be removed from the library, and which passed a resolution prohibiting teacher and student discussion of these books in class.

The Court began its decision by pointing out that the school board's authority to order books is evident:

> Clearly, discretion as to the selection of textbooks must be lodged somewhere, and we can find no federal constitutional prohibition which prevents its being lodged in school board officials who are elected representatives of the people . . . In short, we find no federal constitutional violation in this Board's exercise of curriculum and textbook control as empowered by the Ohio statute.[52]

However, having outlined the expansive power of the school board, the appeals court went on to insist that this power does not mean that the board may remove any book it wishes, as was the lower court's assumption, which was based on Presidents Council:

> The District Judge in our instant case appears to have read this paragraph (in Presidents Council) as upholding an absolute right on the part of this school board to remove from the library and presumably to destroy any books it regarded unfavorably without concern for the First Amendment. We do not read the Second Circuit opinion so broadly . . .If it were unqualified, we would not follow it.[53]

The Court went on to look for the reason the books were removed and found the only explanation in board minutes from one meeting, the sole content of which was a minority report by one member. This member argued for, in addition to the removal of the books at issue, the compulsory adoption of biographies of Captain Eddie Rickenbacker, Herbert Hoover, and Douglas MacArthur, as well as the McGuffy readers.

Finding so little detail on the record, the Court felt compelled to draw its own conclusion:

> In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.[54]

The Court then established First Amendment protection in this area:

> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional mandate or compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place

> conditions on the use of the library which were related solely to the social or political tastes of school board members.[55]

Just as the Second Circuit Court did in Presidents Council, the Sixth Circuit Court compared the facts of the case to the line of reasoning developed in Tinker; however, in Minarcini the Court had a much different interpretation of Tinker than did the Court in Presidents Council. The Second Circuit had used an analysis of Tinker to point out that Presidents Council presented "no problem of freedom of speech or the expression of opinions."

In contrast, the Sixth Circuit concluded in Minarcini that this kind of case presented a more serious threat to freedom of expression than even Tinker did:

> The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in Tinker . . .[56]

Finally, the Sixth Circuit Court addressed the issue of access to information by taking the position that the burden placed upon freedom of expression in the lower court's ruling was not minimized by the availability of the books in question through sources outside the school. "Restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression."[57]

This is essentially the same point that the plaintiffs in Bicknell unsuccessfully argued: the right to receive information is as much protected by the First Amendment as is the right to speak freely. In support of this position, the Sixth Circuit Court pointed to a number of U.S. Supreme Court cases, including Kleindiest v. Mandel,[58] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,[59] and Procunier v. Martinez,[60] all of which extended constitutional protection to both the source and the recipient of a communication.

Although neither was in the Sixth Circuit and thus bound by the rule in

Minarcini, two subsequent U.S. District Court decisions used Minarcini-type reasoning when determining the disposition of actions arising from decisions to remove books and magazines from high school libraries.

In the first, Right to Read v. Chelsea School Committee,[61] at issue was the Chelsea School Committee decision to bar from the high school library an anthology of writings by adolescents entitled Male and Female Under 18. The committee acted after a parent objected to "filthy gutter language" in a poem written by a fifteen-year-old girl.[62] The Chelsea School Committee did not contend that the book was obscene within the meaning of Miller v. California[63] (the controlling Supreme Court case in developing a test for obscenity) but merely that it was "filthy" and "offensive."[64]

The federal district judge in the case ruled that this removal of an "offensive" book from a high school library was in violation of the First Amendment rights of the school's students and teachers. In ruling in favor of the Right to Read Committee, the court relied on the reasoning of the U.S. Supreme Court in Shelton v. Tucker, a case dealing with teacher's rights, that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[65]

In contrast to the reasoning used by courts in Presidents Council and its progeny that removing books is not a constitutionally protected activity, the court employed the traditional First Amendment rationale--the marketplace of ideas concept articulated by Mr. Justice Holmes and reformulated by Mr. Justice Brandeis--to argue that "(w)hat is at stake here is the right to read and be exposed to controversial thoughts and language--a valuable right subject to First Amendment protection."[66]

Citing Tinker as authority, the court treated both the high school students and their teachers as having co-extensive First Amendment rights, with the test

for the exercise of those rights the same for both groups: the clear and present danger test.[67]

In the second case, Salvail v. Nashua Board of Education,[68] a U.S. District Court in New Hampshire decided that the First Amendment was violated by a school board decision requiring the removal of all issues of MS magazine from a senior high school library.

The board action was prompted by an objection on the part of one board member that focused largely on the fact that issues of MS:

> contained advertisements for "vibrators," contraceptives, materials dealing with lesbianism and witchcraft, and gay material. He (the board member) also objected to advertisements for what he described as a pro-communist newspaper ("The Guardian") and advertisements suggesting trips to Cuba. In addition, he felt that the magazine encouraged students and teachers to send away for records made by known communist folk singers.[69]

Two notions were at the heart of the court's decision in Salvail: first, that books, once acquired by a school library, are constitutionally protected; and, second, that books may not be removed solely on the basis of their political content.

For the first notion, the court drew on the thinking of the Sixth Circuit Court of Appeals in Minacini:

> It is . . .clear that the Board is required neither to provide a library for the Nashua Senior High School nor to choose any particular books therefore, but, once having created such a privilege . . .it could not place conditions on the use of the library related solely to the social or political tastes of Board members . . .It is a familiar constitutional principle that a state, having so acted when not compelled, may consequently create a constitutionally protected interest.[70]

Having established that books once acquired are constitutionally protected, the court moved on to the essential issue: why this particular magazine was removed. Presumably, if it was eliminated because of the need for space or for some other reason not related to the content of the magazine, then the Board's action would fall into the category of permissible time, place, and manner

regulation. However, if the magazine were removed because of its content, absent a showing that it was obscene, then, according to the Court, removal constituted impermissible censorship. The Court looked to Miller v. California[71] and quickly determined that MS was not obscene under that case's three-pronged test of obscenity. It then found that other magazines allowed by the Board, such as Redbook, contained articles on sexual matters and concluded that the Board had obfuscated its real reason for banning MS:

> The Court finds that despite protestations contained in the testimony of these parties, it is the "political" content of MS magazine more than its sexual overtones that led to its arbitrary displacement. Such a basis for removal of the publication is constitutionally impermissible.[72]

Quoting from Right to Read, the Court pointed out that unlike the Pacifica case[73] in which the Supreme Court allowed material admittedly not obscene to be censored because of the unique potential of the broadcast media to invade the privacy of the home, in a library setting there is no danger of invasion. Rather, the "fundamental issue here is whether there should be opportunity for selection."[74] To reinforce this position, the Court used Virginia State Board of Pharmacy to stress the importance of a potential receiver having access to information.

Conclusions

It is obvious that the federal courts are not in agreement in the area of delineating the First Amendment rights of minors. Different federal Circuit Courts of Appeals are moving in different judicial directions, each relying on its own interpretation of the standards proposed by the Supreme Court in Ginsberg and Tinker. Until such time as the Supreme Court sees fit to clarify its stand and explicate the area of minors' First Amendment rights, the power of school authorities to ban publications in school libraries will depend to a large extent on the emerging law in each individual jurisdiction.

FOOTNOTES

[1]Ginsberg v. New York, 390 U.S. 629 (1968).

[2]Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

[3]"Censorship of Textbooks is Found on Rise in Schools Around Nation," New York Times, March 27, 1979, Page B-15.

[4]"Variable Obscenity" is the name given to laws such as that of New York.

[5]390 U.S. 629, 639 (1968).

[6]Id. at 639.

[7]Id. at 640.

[8]Id. at 635.

[9]Id. at 641.

[10]Mr. Justice Holmes authored the clear and present danger doctrine in Schenck v. United States, 249 U.S. 47 (1919) as a guide to the boundaries of protected speech. Under the doctrine, political expression can be punished when the circumstances are such that they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[11]390 U.S. 628, 641 (1968).

[12]Id. at 649-50.

[13]"The Supreme Court: 1967 Term," 82 Harvard Law Review 63, 127 (1968).

[14]Id. at 127-28.

[15]393 U.S. 503 (1969).

[16]Id. at 506.

[17]Id. at 508.

[18]Id.

[19]Id.

[20]Id. The notion that children have obligations to the state adds emphasis to the Court's determination that children have constitutional rights. To have responsibilities to the state suggests that one is a participating, respected citizen. See Karst, K.L., "The Supreme Court: 1976 Term," 91 Harvard Law Review 1, 8-11 (1977).

[21]Id. at 509 note 3.

[22]"Parental Consent Requirements," at 1009.

[23]See, generally, Meiklejohn, A., Political Freedom , (New York: Harper and Row, 1948).

[24]393 U.S. 503 (1969).

[25]457 F. 2d 189 (1972).

[26]Id. at 290.

[27]Id.

[28]Id. at 291.

[29]Epperson v. Arkansas, 393 U.S. 97 (1968). In this case the U.S. Supreme Court atruck down a state statute which made it unlawful for a teacher in any state-supported school to use a textbook that taught that men are descended from a lower order of animals. The court vitiated the statute on First Amendment grounds, stating that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." 393 U.S. at 106.

[30]457 F. 2d 289 at 291 (1972).

[31]Id. at 292

[32]Id.

[33]Id. at 293.

[34]Id.

[35]5 Med. L. Rptr. 1947 (1979)

[36]Books at issue were Slaughterhouse Five by Kurt Vonnegut, The Naked Ape by Desmond Morris, Down These Mean Streets by Piri Thomas, Best Short Stories of Negro Writers edited by Langston Hughes, Go Ask Alice (anonymous), Laughing Boy by Oliver LaFarge, Black Boy by Richard Wright, A Hero Ain't Nothing But a Sandwich by Alice Childress, Soul on Ice by Eldridge Cleaver, A Reader for Writers edited by Jerome Archer, and The Fixer by Bernard Malumud.

[37]5 Med. L. Rptr. 1947 at 1502 (1979).

[38]Minarcini v. Strongsville City School District 541 F. 2d 577 (1976), Right to Read Committee v. Chelsea School Committee 4 Med. L. Rptr. 13 (1978), and Salvail v. Nashua Board of Education 5 Med. L. Rptr. 1096 (1979).

[39]5 Med. L. Rptr. 1947, 1501-02 (1979).

[40]Id. at 1504.

[41]4 Med. L. Rptr. 2028 (1979).

[42]The Wanderers by Richard Price and Dog Day Afternoon by Patrick Mann.

[43]5 Med. L. Rptr. 2028 (1979).

[44]Id. at 2030.

[45]Id. at 2031.

[46]425 U.S. 748 (1976).

[47]408 U.S. 753 (1972).

[48]5 Med. L. Rptr. 2028, 2032 (1978).

[49]541 F. 2d 577 (1976).

[50]4 Med. L. Rptr. 1113 (1978).

[51]5 Med. L. Rptr. 1096 (1979).

[52]541 F. 2d 577, 579-580 (1976).

[53]Id. at 581.

[54]Id. at 582.

[55]Id.

[56]Id.

[57]Id.

[58]408 U.S. 753 (1972).

[59]425 U.S. 748 (1976).

[60]416 U.S. 396 (1974).

[61]4 Med. L. Rptr. 1113 (1978).

[62]Id. at 1115

[63]413 U.S. 15 (1973).

[64]4 Med. L. Rptr. 1113, 1115 (1978).

[65]364 U.S. 479, 487 (1960).

[66]4 Med. L. Rptr. 1113, 1121 (1978).

[67]Id. at 1120.

[68]5 Med. L. Rptr. 1096 (1979).

[69]Id. at 1098.

[70]Id. at 1099.

[71] 413 U.S. 15 (1973).

[72] 5 Med. L. Rptr. 1096, 1100 (1979).

[73] 438 U.S. 726 (1978).

[74] 5 Med. L. Rptr. 1096, 1110 (1979).